

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KEVIN G. SMITH,)	8:10CV278
)	
Petitioner,)	
)	
v.)	MEMORANDUM
)	AND ORDER
ROBERT BAKEWELL, Warden, and)	
ROBERT HOUSTON, Director,)	
)	
Respondents.)	

This matter is before the court on Petitioner's Notice of Appeal. (Filing No. [13](#).) On October 20, 2010, the court dismissed Petitioner's habeas corpus claims with prejudice and entered judgment against him. (Filing Nos. [8](#) and [9](#).) On November 18, 2010, Petitioner filed a timely Notice of Appeal of the court's Judgment. (Filing No. [13](#).) Petitioner has been released from prison and paid the full appellate filing fee of \$455.00 on December 21, 2010.

Although Petitioner paid the filing fee in full, the court notes that Petitioner has not filed a Motion for Certificate of Appealability. (*See* Docket Sheet.) Indeed, before a petitioner may appeal the dismissal of a petition for writ of habeas corpus, a "Certificate of Appealability" must issue. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the right to appeal such a dismissal is governed by [28 U.S.C. § 2253\(c\)](#), which states:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

(2) A certificate of appealability may issue under paragraph (1) only if

the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).¹

A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. *See* [28 U.S.C. § 2253\(c\)\(2\)](#). Such a showing requires a demonstration “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” [Slack v. McDaniel, 529 U.S. 473, 484 \(2000\)](#) (internal quotation marks omitted), citing [Barefoot v. Estelle, 463 U.S. 894 \(1983\)](#) (defining pre-AEDPA standard for a certificate of probable cause to appeal).

“Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy [§2253\(c\)](#) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” [Slack, 529 U.S. at 484](#). Similarly, if the district court denies a petition for writ of habeas corpus on procedural grounds without reaching the underlying constitutional claims on the merits:

[A] COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and ... would find it debatable whether the district court was correct in its procedural ruling Where

¹Similarly, [Federal Rule of Appellate Procedure 22\(b\)](#), as amended by the AEDPA, indicates that in an action pursuant to [28 U.S.C. § 2254](#), a notice of appeal triggers the requirement that the district judge who rendered the judgment either issue a certificate of appealability or state the reasons why such a certificate should not issue. *See generally* [Tiedeman v. Benson, 122 F.3d 518, 521 \(8th Cir. 1997\)](#).

a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

Id.

Petitioner has not filed a motion for a certificate of appealability or a brief in support. (*See* Docket Sheet.) This matter cannot proceed on appeal until the question of the certificate of appealability is considered.

IT IS THEREFORE ORDERED that:

1. Petitioner shall have until **January 21, 2011**, to file a motion for certificate of appealability and brief in support.
2. In the event that Petitioner fails to file a motion and brief as set forth in this Memorandum and Order, the court will deny the issuance of a certificate of appealability without further notice.
3. The Clerk of the court is directed to set a pro se case management deadline in this case with the following text: January 21, 2011: check for COA and separate brief and deny if none filed.
4. Petitioner's Motion for Leave to Appeal IFP (filing no. [14](#)) is denied as moot.

DATED this 22nd day of December, 2010.

BY THE COURT:

Richard G. Kopf
United States District Judge

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